

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY WATERS,)
NICKOLAS KRAMER and JASON)
CADEK, CRYSTAL VON KAMPEN and)
CARLA MORRIS-VON KAMPEN,)
GREGORY TUBACH and WILLIAM)
ROBY, JESSICA KALLSTROM-)
SCHRECKENGOST and KATHLEEN)
KALLSTROM-SCHRECKENGOST,)
MARJORIE PLUMB and TRACY WEITZ,)
and RANDALL CLARK and THOMAS)
MADDOX,)

Civil Action No. 8:13-cv-00215

Plaintiffs,)

v.)

AMENDED COMPLAINT

DAVE HEINEMAN in his official)
capacity as Governor of Nebraska, JON)
BRUNING in his official capacity as)
Attorney General of Nebraska, KIM)
CONROY in her official capacity as Tax)
Commissioner of the Nebraska Department)
of Revenue, KERRY WINTERER in his)
official capacity as CEO of the Nebraska)
Department of Health and Human Services,)
and DAN NOLTE in his official capacity as)
the Lancaster County Clerk,)

Defendants.)

INTRODUCTION

1. Plaintiffs are loving, committed same-sex couples who seek to marry in Nebraska or already are married, having wed in another state, but are treated as legal strangers in Nebraska. They bring this action pursuant to 42 USC §1983 seeking declaratory and injunctive relief for the violation of their rights under the Fourteenth Amendment to the United States Constitution caused by Nebraska’s exclusion of same-sex couples from

marrying and its prohibition against recognizing the marriages of same-sex couples validly entered into in other jurisdictions. Neb. Const. art. I, § 29.

2. The plaintiff couples, like other committed couples, have cared for each other, supported each other, sacrificed for each other, and made plans for the future with each other. Some have endured great challenges and hardships together, such as serious illness. Some are raising children together. Like other couples who have made a lifetime commitment to each other, the plaintiff couples are spouses in every sense, except that Nebraska says they cannot marry and, if they have married in other states, their marriages are not honored here.

3. Nebraska's exclusion of same-sex couples from marriage adversely impacts the plaintiffs and other same-sex couples across the state in significant ways. It denies same-sex couples and their families the numerous legal protections afforded to married couples. For example, when one partner or spouse dies, the survivor may face serious financial hardship, including the loss of her home, because she is denied the inheritance tax exemption and homestead protection provided to different-sex widows. Public employees with same-sex spouses and partners are denied spousal health insurance and pension benefits. And for lesbian and gay couples with children, the exclusion from marriage profoundly impacts their families by denying their children the security of having a legal relationship with both of their parents, depriving them of critical resources and leaving them vulnerable in the event their legal parent dies or becomes incapacitated.

4. In addition to significant tangible harms, Nebraska's exclusion of same-sex couples from marriage stigmatizes lesbian and gay couples and their children by denying them "a dignity and status of immense import." *United States v. Windsor*, 133 S.Ct. 2675,

2692 (2013). The exclusion “tells [same-sex] couples, and all the world,” that their relationships are “unworthy” of recognition. *Id.* at 2694. And it “humiliates the . . . children now being raised by same-sex couples” and “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Id.*

5. Nebraska’s exclusion of same-sex couples from marriage is unconstitutional. “[N]o legitimate purpose overcomes [its] purpose and effect to disparage and to injure” lesbian and gay couples and their families. *Id.* at 2696.

6. Thirty-five states and Washington, D.C., have now ended their discriminatory exclusion of same-sex couples from the revered institution of marriage, many as a result of the growing judicial consensus that such discrimination cannot stand after the Supreme Court’s decision in *Windsor*. Without intervention by the Court, lesbian and gay couples in Nebraska will continue to be denied the respect and critical protections that only marriage provides.

7. Accordingly, the plaintiffs seek declaratory and injunctive relief on the grounds that Nebraska’s exclusion of same-sex couples from marriage and refusal to recognize the valid marriages of same-sex couples from other jurisdictions and defendants enforcement of the marriage exclusion violates the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

PLAINTIFFS

Sally and Susan Waters

8. Sally and Susan Waters have been in a committed relationship for over 15 years. They had a religious wedding in 1998 at their church in Omaha and got married on September 19, 2008, in California, where they were living at the time.

9. Sally, 58, and Susan, 53, were both born and raised in Nebraska, Sally in Omaha and Susan in Burwell. They moved to California in 2002 after adopting their first child, G.W. (now 13). They left Nebraska because they could not both be legally recognized parents of their daughter here. That is because Nebraska law limits joint and second parent adoption to married couples but bars same-sex couples from marrying or having their marriages recognized. Sally and Susan feared that the lack of a legal tie to one of her parents put their daughter at risk in the event something happened to her legal parent, so they moved to a state where they were able to provide her with the security of two legal parents by doing a second parent adoption.

10. A few years later, Sally and Susan expanded their family, welcoming their second child, J.W., now 10, whom they jointly adopted out of foster care in California.

11. In 2010, Sally and Susan moved their family back to Nebraska. They missed their families and wanted to be closer to their aging parents. Their return to Nebraska was joyful and the family quickly got back into community life, including their church, North Side Christian Church, where they are active members.

12. Susan works at the University of Nebraska Omaha helping faculty use technology in the classroom. Sally is a leadership development consultant at Mutual of Omaha.

13. In 2011, Sally and Susan welcomed into their family a teenager, K.J., now 18, for whom they are legal guardians.

14. In January 2013, Sally was diagnosed with stage III breast cancer. She has undergone surgery, chemotherapy and radiation. The treatment took a toll on Sally physically and she had to stop working for several months as a result. Susan has been by Sally's side throughout the grueling treatment, taking leave from work to care for her and to manage their home and family during hospitalizations that resulted from Sally's poor response to chemotherapy. The loss of Sally's income took a significant toll on the family's finances, as did the medical bills.

15. By April 2014, Sally's cancer had spread to her spine and was diagnosed as stage IV metastatic breast cancer. She is under treatment again both to slow the tumor growth and to deal with the debilitating pain. She and Susan have been taking steps to get Sally's affairs in order, as her future is very uncertain. The fact that their marriage is not recognized in their home state adds to the already excruciating pain and stress of facing a terminal illness. While they have hired lawyers to draw up wills, powers of attorney, and living wills, Sally and Susan worry that if they don't have the documents readily at hand during a medical emergency, Susan will not be able to make medical decisions for Sally if that becomes necessary, get information about her condition from doctors, or even be by her side in the hospital.

16. Sally and Susan are also anxious about how Susan will manage to support the family after Sally passes away. They worry about the fact that Susan will have to pay an 18% inheritance tax on half of the property they share, including the home they own together, because she won't be entitled to the spousal rate of 1% and the homestead

protection for widows. With that kind of tax bill, they don't know if Susan and the kids will be able to remain in their home. In addition, when Susan reaches retirement age, she will not be entitled to Sally's social security since her home state does not recognize their marriage. Furthermore, as beneficiary of Sally's 401k, but not recognized as her spouse, Susan will not be allowed to roll the money into her own IRA and will have to pay taxes on it right away.

17. Because their marriage is not recognized under Nebraska law, when Sally passes away, her death certificate will not reflect her marriage to Susan and, instead, will list her marital status as "single" and leave blank the space for surviving spouse. No widow should have to suffer this indignity in her time of grief.

18. Sally and Susan jointly file their federal income taxes as married filing jointly. They would like to file their state income taxes the same way but are required to file Nebraska taxes as "single." Having to file as "single" and leave blank the space provided on their tax returns for "spouse," denying the existence of their marriage, is demeaning and hurtful to them.

Nickolas Kramer and Jason Cadek

19. Nickolas Kramer and Jason Cadek have been in a committed relationship for over ten years. They were married on October 12, 2013 in Iowa. They live in Omaha, where Nick, 42, is a management consultant and Jason, 37, is a compliance auditor for a bank. Jason grew up in North Loup, Nebraska and has extended family there.

20. In 2011, Nick and Jason became parents of a baby girl A.C.-K. who is now 3 years old. But because Nebraska law only allows joint or second parent adoption for married couples and their marriage is not recognized in Nebraska, A.C.-K. could only be

adopted by one of her two parents. As a result, Jason, who the child knows as “Daddy”, has no legal ties to her.

21. The lack of a legal parent-child relationship with Jason denies A.C.-K. important protections and economic resources and creates profound stress and insecurity for the family. For example, Nick and Jason worry about Jason not being able to make medical decisions for their daughter, or even be with her in the hospital, in the event of a medical emergency. If Jason were to pass away, A.C.-K. would be afforded none of the economic supports available to children who lose a parent such as social security survivor benefits. What most keeps Nick and Jason awake at night is the fear that their daughter might not be able to remain with Jason if anything were to happen to Nick.

22. Nick and Jason also worry about the psychological impact on their daughter when she is old enough to understand that Jason is not her legal parent and that in the eyes of the state, her family is not considered a real family worthy of legal recognition. They are hopeful that the law will change before that time comes.

23. Nick and Jason are fortunate that Jason’s employer provides health insurance benefits for Nick and A.C.-K. despite the fact that they are not considered to be his family members under Nebraska law. However, because their marriage is not recognized by the State of Nebraska, they have to pay taxes on the coverage, which amounts to \$5,650 in taxable income a year. If their marriage were recognized, the family health benefits would not be taxed.

24. Nick and Jason file their federal income taxes as married filing jointly. They would like to file their state income taxes the same way, but are required to file Nebraska taxes as “single.” Having to file as “single” and leave blank the space provided on their

tax returns for “spouse,” denying the existence of their marriage, is demeaning and hurtful to them.

Crystal Von Kampen and Carla Morris-Von Kampen

25. Crystal Von Kampen and Carla Morris-Von Kampen have been in a committed relationship for five years. They were married in Iowa on November 1, 2013. They live in Norfolk, where both have lived most of their lives.

26. Carla, 40, works at a non-profit that helps families with children who have emotional and mental disabilities. Crystal, 35, served in the Navy for 8 years. She deployed to Iraq with the Marine Corps, where she was a Navy corpsman. She is now disabled as a result of post-traumatic stress.

27. Nebraska’s refusal to recognize Crystal’s marriage to Carla means that she cannot access various veterans’ benefits that otherwise would be available to her and her family. Crystal applied for a Veterans’ Administration home loan—a loan program for veterans to help purchase properties. The application was submitted under both Crystal and Carla’s names since the loan was for their shared home. The state Veterans’ Administration office informed Crystal that because their marriage isn’t recognized in Nebraska, their loan will not qualify for VA financing as a veteran and spouse loan. As a result, they have had to pay an additional \$11,000 for their home loan.

28. In addition, Carla’s daughter from a prior marriage, who is a college junior, applied for a Waiver of Tuition available to step-children of disabled veterans. The director of the Nebraska Department of Veterans Affairs denied her application because Crystal and Carla’s marriage is not recognized in Nebraska. The denial was upheld on

appeal by the Veterans Advisory Commission. The denial of this benefit means that Carla's daughter has to pay approximately \$5,600 per year more in tuition.

29. Crystal and Carla file their federal income taxes as married filing jointly. They would like to file their state income taxes the same way, but are required to file Nebraska taxes as "single." Having to file as "single" and leave blank the space provided on their tax returns for "spouse," denying the existence of their marriage, is demeaning and hurtful to them.

Gregory Tubach and William Roby

30. Gregory Tubach and William Roby have been in a committed relationship for 28 years. They live in Lincoln, where Greg, 49, is an editor at a publishing company, and Bil, 57, works at a state agency.

31. Greg was born and raised in Lincoln and Bil's family moved to Lincoln when he was a young child.

32. Greg and Bil have taken all the steps they can to replicate protections of marriage, such as hire an attorney to prepare wills, powers of attorney, and healthcare proxies (which cost them \$500), but they understand that these documents can provide only a small fraction of the protections that marriage provides.

33. Greg and Bil would like to get married because they love and are committed to one another and they would like all of the protections, the security and the dignity that come with being married. They want to marry in Nebraska, as opposed to in another state, because Nebraska is their home. In addition, Nebraska is where their friends and most of their extended family lives and it's important to them for their loved ones to be present at their wedding.

Jessica and Kathleen Kallstrom-Schreckengost

34. Jessica and Kathleen Kallstrom-Schreckengost of Omaha have been in a committed relationship since they met in college over ten years ago. They got married on May 12, 2010 in Massachusetts. Jessica, 33, is an attorney and Kathleen, 29, is a clinical psychologist.

35. Jessica and Kathleen recently returned to Nebraska, where Kathleen grew up, after living in New Jersey and New York for several years. Their decision to come to Nebraska was motivated in part by the desire to be near Kathleen's extended family after the birth of their son, S.K.S., now 9 months old. Jessica and Kathleen would like to have more children but worry about the fact that if they have a child while living in Nebraska, the child would only be able to have a legal parent-child relationship with one of them.

36. Jessica and Kathleen are concerned that the state's refusal to recognize their marriage sends the message to their son that his family is less deserving of respect and support than other families.

37. Jessica and Kathleen file their federal income taxes as married filing jointly. They would like to file their state income taxes the same way but are required to file Nebraska taxes as "single." Having to file state taxes as "single" while filing federal taxes as married couple will cause the couple to incur greater fees from their accountant. And having to file as single and leave blank the space provided on their tax returns for "spouse," denying the existence of their marriage, is demeaning and hurtful to them.

Marjorie Plumb and Tracy Weitz

38. Marjorie Plumb and Tracy Weitz of Omaha have been in a committed relationship for over ten years. Marj, who is 55, and Tracy, 49, were married on August 20, 2008, in

California, where they used to live. They moved to Nebraska in January 2014 because of a job opportunity for Tracey at a local foundation. Marj has her own business, a firm providing management consulting and executive coaching to non-profit organizations.

39. After living their lives as a married couple for over five years in a state that recognized their marriage and, thus, enjoying the security marriage provides, it was upsetting that the price of moving to Nebraska was to effectively become divorced against their wishes, at least for purposes of state law.

40. The non-recognition of their marriage denies them the security of knowing that they will be recognized as spouses by medical providers for purposes of accessing information about one another's care and making medical decisions in the event either of them should become incapacitated. It also denies them the peace of mind of knowing that when one of them dies, the survivor will be able to retain all of their shared property, including their jointly owned home, as opposed to being hit with an 18% inheritance tax.

41. Moreover, the stigma of having their marriage disrespected permeates their every-day activities. Every time they have to answer the simple question "are you married?" such as at the doctor's office or when signing documents at the bank, and cannot give the simple answer "yes", it's a reminder of their second-class status.

42. Marj and Tracy have hired attorneys to draw up wills and powers of attorney and have been told this will cost them about \$1,000. But they understand that these documents will only provide a small fraction of the protections that come with marriage.

43. Marj and Tracy file their federal income taxes as married filing jointly. They would like to file their state income taxes the same way but are required to file Nebraska taxes as "single." This costs them approximately \$400 more in accountant fees than if

they could file jointly. In addition, having to file as “single” and leave blank the space provided on their tax returns for “spouse,” denying the existence of their marriage, is demeaning and hurtful to them.

Randall Clark and Thomas Maddox

44. Randall Clark and Thomas Maddox have been in a committed relationship for over thirty years. They were married on August 22, 2008, in La Jolla, California, where they live. Randy, who is 61, is a CPA and is the chief financial officer for a company based in Kansas City. Tom, 57, is a family physician who practices in San Diego and also teaches at a family medicine residency program.

45. Tom grew up in Lincoln and attended both undergraduate and medical school at the University of Nebraska. His extended family continues to live in Nebraska.

46. Tom and Randy own commercial properties in Nebraska. They therefore are required to pay taxes here. They file their federal income taxes as married filing jointly. In 2013 they attempted to file their Nebraska state income tax the same way, but received a letter from the Nebraska Department of Revenue advising that because the Nebraska Constitution does not recognize same-sex marriage, they may not file jointly and must file using the single filing status. Having to file as single in Nebraska adds to the burden of their tax preparation, requiring many additional hours of labor. Moreover, having to file as “single” and leave blank the space provided on their tax returns for “spouse,” denying the existence of their marriage, is demeaning and hurtful to them.

47. It is upsetting to Randy and Tom that whenever they come to Nebraska, they effectively become unmarried for the duration of their visit. They are concerned about

not being recognized as spouses if medical issues were to arise or one of them were to pass away while in Nebraska.

48. Plaintiffs Susan and Sally Waters, Nick Kramer and Jason Cadek, Crystal Von Kampen and Catrina Morris-Von Kampen, Jessica and Kathleen Kallstrom-Schreckengost, Marj Plumb and Tracey Weitz, and Randy Clark and Tom Maddox all were validly married under the laws of other states and their marriages would be recognized in Nebraska but for the fact that they are married to a person of the same sex.

49. Plaintiffs Greg Tubach and Bil Roby are eligible to marry but for the fact that they wish to marry someone of the same sex. They are over the age of 18, fully competent, are not married to anyone else, are not within a prohibited degree of consanguinity of each other, and are willing and able to assume all of the obligations of marriage.

DEFENDANTS

Governor Dave Heineman

50. Defendant Dave Heineman is sued in his official capacity as the Governor of the State of Nebraska. The Governor is the chief executive officer of the State of Nebraska, and is charged with the responsibility to ensure the laws of the State of Nebraska, including the exclusion of same-sex couples from marriage, are enforced.

Attorney General Jon Bruning

51. Defendant Jon Bruning is sued in his official capacity as the Attorney General of the State of Nebraska. The Attorney General is the chief legal officer for the State of Nebraska and is charged with enforcing the laws of the State of Nebraska, including the exclusion of same-sex couples from marriage.

Kim Conroy, Tax Commissioner for the Nebraska Department of Revenue

52. Defendant Kim Conroy is sued in her official capacity as the Tax Commissioner for the State Department of Revenue. The Tax Commissioner is charged with the responsibility of regulating, assessing and collecting taxes. The Tax Commissioner enforces Nebraska's exclusion of same-sex couples from marriage in the context of tax collection.

53. A revenue ruling signed by the Tax Commissioner provides that same-sex married couples may not file income taxes jointly because their marriages are not recognized under the Nebraska Constitution. Revenue Ruling 22-13-1, Individual Income Tax. The Department of Revenue's website contains a document called "Frequently Asked Questions for Individuals in a Same-Sex Marriage," which advises that in order to file Nebraska income tax returns, such individuals "must complete a pro forma federal return (a 'mocked up' return that is not actually filed with the IRS) using the single, or if qualified, head of household filing status" and use the numbers from the pro forma federal return to file a Nebraska return. Being required to file as single, as opposed to jointly, causes a dignitary harm to married same-sex couples and, for some, increases their tax liability.

54. In addition, the Department of Revenue's "Frequently Asked Questions for Individuals in a Same-Sex Marriage" states that "[b]ecause Nebraska does not recognize a same-sex marriage, employers may not exclude the value of an employer-provided health insurance plan for a same-sex spouse from an employee's income." Thus, employees who receive such health insurance for their same-sex spouses must pay taxes on that benefit.

Kerry Winterer, CEO of the Nebraska Department of Health and Human Services

55. Defendant Kerry Winterer is sued in his official capacity as the CEO of the Nebraska Department of Health and Human Services (HHS). Within HHS is the Office of Vital Records, which maintains vital records, including marriage licenses. HHS is responsible for preparing the “marriage worksheet” for marriage license applicants used by county clerks across Nebraska, which presently prohibits persons of the same sex from obtaining a marriage license by requiring both a “Bride” and a “Groom.” Moreover, upon information and belief, because Nebraska does not permit same-sex couples to marry, HHS will not accept or maintain records of marriages of same-sex couples.

Dan Nolte, Lancaster County Clerk

56. Defendant Dan Nolte is sued in his official capacity as the Lancaster County Clerk. In Nebraska, county clerks, including the Lancaster County Clerk, are responsible for issuing marriage licenses. They are required to issue marriage licenses in accordance with state law, which forbids marriage by same-sex couples. Thus, the Lancaster County Clerk enforces Nebraska’s exclusion of same-sex couples from marriage by limiting marriage licenses to opposite-sex couples

JURISDICTION AND VENUE

57. This court has original jurisdiction over this matter pursuant to 28 USC §1331 and §1343, as plaintiffs’ Complaint raises questions under the Constitution of the United States.

58. Venue is proper in this District pursuant to 28 USC §1391(b) as all defendants reside and have offices in this District and the State of Nebraska and a substantial portion of the events giving rise to this claim occurred in this District.

59. This Court has the authority to enter a declaratory judgment and to provide permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

FACTUAL BACKGROUND

Nebraska's prohibition of marriage for same-sex couples

60. Article I, § 29 of the Nebraska Constitution, enacted in 2000 by voter initiative, provides: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”

61. As a result, marriage in Nebraska is legally available only to opposite-sex couples. Same-sex couples may not marry in Nebraska, and if they are married elsewhere, their marriages are not recognized in Nebraska. Moreover, the amendment invalidates and bars recognition of other forms of unions of same-sex couples such as civil union and domestic partnership.

Same-sex and opposite-sex couples are similarly situated for purposes of marriage.

62. The Supreme Court has called marriage “the most important relation in life,” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted), and an “expression[] of emotional support and public commitment.” *Turner v. Safley*, 482 U.S. 78, 95 (1987). It is “a far-reaching legal acknowledgement of the intimate relationship between two people. . . .” *Windsor*, 133 S.Ct. at 2692. This is as true for same-sex couples as it is for opposite-sex couples.

63. Same-sex couples such as the plaintiff couples are identical to opposite-sex couples in all of the characteristics relevant to marriage.

64. Same-sex couples make the same commitment to one another as opposite-sex couples. Like opposite-sex couples, same-sex couples build their lives together, plan their futures together and hope to grow old together. Like opposite-sex couples, same-sex couples support one another emotionally and financially and take care of one another physically when faced with injury or illness. Like some opposite-sex couples, some same-sex couples like plaintiffs Sally and Susan Waters, Nick Cramer and Jason Cadek, and Jessica and Kathleen Kallstrom-Schreckengost are parents raising children together.

65. Same-sex couples seeking to marry are just as willing and able as opposite-sex couples to assume the obligations of marriage.

66. The plaintiff couples and other same-sex couples in Nebraska, if permitted to marry or have their marriages recognized, would benefit no less than opposite-sex couples from the many legal protections and the social recognition afforded to married couples.

67. There was a time when an individual's sex was relevant to his or her legal rights and duties within the marital relationship. For example, husbands had a duty to support their wives but not vice versa and husbands had legal ownership of all property belonging to their wives. But these legal distinctions have all been removed such that the legal rights and duties of husbands and wives are now identical.

The exclusion of same-sex couples from marriage causes substantial harm to families.

68. By preventing same-sex couples from marrying and refusing to recognize their marriages from other states, Nebraska law deprives them and their families of numerous

legal protections that are available to opposite-sex couples by virtue of their marriages.

By way of example only:

- a. Opposite-sex spouses are entitled to pension benefits payable by the statewide public retirement system, while same-sex spouses and partners are not. Neb. Rev. Stat. § 42-1102.
- b. Opposite-sex spouses may jointly adopt a child together, while same-sex spouses and partners may not. Neb. Rev. Stat. § 43-101.
- c. Opposite-sex spouses may adopt one another's children, while same-sex spouses and partners may not. *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002).
- d. Opposite-sex spouses have the option of filing state tax income returns jointly. Neb. Rev. Stat. § 77-2732. Same-sex spouses and partners must file separately. Nebraska Department of Revenue Ruling 21-13-1.
- e. Opposite-sex spouses are presumed to be each other's survivor for the purposes of custodial trusts, while same-sex spouses and partners are not. Neb. Rev. Stat. § 30-3507.
- f. Opposite-sex spouses may make health care and end of life decisions for each other in the absence of an advance directive, while same-sex spouses and partners may not.
- g. Opposite-sex surviving spouses are the default decision-makers relating to the disposition of their spouse's remains, while

same-sex surviving spouses or partners are not. Neb. Rev. Stat. § 30-2223.

- h. Surviving opposite-sex spouses are permitted to inherit at a tax rate of 1% and have a homestead allowance to protect the value of the home (Neb. Rev. Stat. § 77-2004), while surviving same-sex spouses or partners inherit at a tax rate of 18% with no homestead allowance. Neb. Rev. Stat. § 77-2006.
- i. Opposite-sex spouses automatically inherit from one another as a matter of law even if there is no written will, while same-sex spouses and partners inherit nothing from each other if they die without a will. Neb. Rev. Stat. § 30-2302.
- j. If an opposite-sex spouse attempts to leave less than 50% of his or her estate to the surviving spouse, the survivor has the right to inherit 50%; a surviving same-sex spouse or partner would not have this protection. Neb. Rev. Stat. § 30-2313.
- k. An opposite-sex surviving spouse of an officer in the Nebraska State Patrol automatically receives a percentage of the annuity provided to such officers, while a same-sex surviving spouse or partner receives nothing. Neb. Rev. Stat. § 81-2026.
- l. An opposite-sex surviving spouse of a retired judge automatically receives 50% of the monthly benefit paid to retired judges, while a same-sex surviving spouse or partner receives nothing. Neb. Rev. Stat. § 24-707.01.

- m. An opposite-sex surviving spouse of a firefighter is entitled to the firefighter's pension, while a same-sex surviving spouse or partner is not. Neb. Rev. Stat. § 16-1029.
- n. An opposite-sex surviving spouse of a veteran who is paraplegic or a multiple amputee is exempt from property tax, while a same-sex surviving spouse or partner cannot receive the same exemption. Neb. Rev. Stat. § 77-3527.
- o. An opposite-sex surviving spouse is presumed to be a dependent for support of a deceased employee under the Workers Compensation law, while a same-sex surviving spouse or partner has no such presumption. Neb. Rev. Stat. § 48-124.
- p. An opposite-sex surviving spouse is entitled to continue coverage under his or her spouse's employee health benefits, while a same-sex surviving spouse or partner has no such coverage. Neb. Rev. Stat. § 44-1643.
- q. Opposite-sex spouses are not required to testify against their spouse in a criminal trial while a same-sex spouses and partners have no such privilege. Neb. Rev. Stat. § 27-505.
- r. Opposite-sex spouses may take out sickness or accident insurance upon each other without written consent, while same-sex spouses and partners may not. Neb. Rev. Stat. § 44-704.

- s. Opposite-sex spouses upon dissolution of their relationship may petition the court for division of property and debts upon and alimony, while same-sex spouses and partners may not. Neb. Rev. Stat. § 42-365.

69. The exclusion of same-sex couples from marriage also denies plaintiffs and other same-sex couples in Nebraska eligibility for numerous federal protections afforded to married couples. Some of the federal protections for married couples are only available to couples if their marriages are legally recognized in the state in which they live. *See, e.g.*, 43 U.S.C. § 416(h)(1)(A)(i) (marriage eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act). Thus, even the married plaintiff couples cannot access such federal protections as long as Nebraska refuses to recognize their marriages.

70. Excluding same-sex couples from marriage also harms couples and their children by denying them the social recognition that comes with marriage. Marriage has profound social significance both for the couple that gets married and the family, friends and community that surround them. The terms “married” and “spouse” have universally understood meanings that command respect for a couple’s relationship and the commitment they have made.

The exclusion from the esteemed institution of marriage also demeans and stigmatizes lesbian and gay couples and their children by sending the message that they are less worthy and valued than families headed by opposite-sex couples.

Excluding same-sex couples from marriage is not rationally related to a legitimate government interest, let alone able to withstand heightened scrutiny.

71. The prohibition against marriage for same-sex couples in Nebraska—both the bar against marrying and the non-recognition of their marriages validly entered into in other states—is not rationally related to any legitimate government interest, let alone able to withstand heightened scrutiny.

72. Nebraska’s ban on marriage for same-sex couples is not rationally related to any interest in procreation or promoting the well-being of children. Excluding same-sex couples from marriage bears no relation to any such interest because whether same-sex couples are permitted to marry does not rationally affect the procreative and child-rearing decisions of same-sex or opposite-sex couples.

73. Moreover, there is no legitimate basis for Nebraska to assert a preference for child-rearing by opposite-sex couples over same-sex couples. There is a consensus within the scientific community, based on over thirty years of research, that children raised by same-sex couples fare no differently than children raised by opposite-sex couples. This is recognized by every major professional organization dedicated to children’s health and welfare including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, the National Association of Social Workers and the Child Welfare League of America.

74. Excluding same-sex couples from marriage serves only to harm the children raised by lesbian and gay couples by denying their families significant benefits and by branding their families as inferior and less deserving of respect and, thus, encouraging private bias and discrimination. The state’s interest in the welfare of children of lesbian and gay parents is as great as its interest in the welfare of other children.

75. The marriage exclusion furthers no legitimate government interest; it serves only to disparage and injure same-sex couples. Indeed, the spokesperson for the proponents of the marriage amendment publicly stated that the amendment was “necessary to send a message to society about homosexuality” that “heterosexuality and homosexuality are not morally equivalent” and that “homosexuality is a sin and should not be sanctioned even by ‘quasi-marriage’ unions such as domestic partnerships and civil unions.” This is not a legitimate basis for unequal treatment of same-sex couples under the law, as the Supreme Court has recognized. *Windsor*, 133 S.Ct. at 2693.

CLAIMS FOR RELIEF

COUNT I:

**Deprivation of the Fundamental Right to Marry in
Violation of the Due Process Clause of the
Fourteenth Amendment to the United States Constitution.
(42 U.S.C. § 1983)**

76. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

77. The Fourteenth Amendment to the United States Constitution precludes any State from “depriv[ing] any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1. Governmental interference with a fundamental right may be sustained only upon a showing that the legislation is closely tailored to serve an important governmental interest.

78. The Supreme Court has long recognized that marriage is a fundamental right and that choices about marriage, like choices about other aspects of family, are a central part of the liberty protected by the Due Process Clause.

79. Nebraska denies the plaintiff couples and other same-sex couples this fundamental right by denying them access to the state-recognized institution of marriage and refusing to recognize the marriages they entered into in other states.

80. Nebraska can demonstrate no important interest to justify denying the plaintiff couples this fundamental right. Indeed, it cannot demonstrate that the denial is tailored to any legitimate interest at all.

81. Nebraska's prohibition of marriage between persons of the same sex and its refusal to recognize marriages entered into by same-sex couples in other jurisdictions violates the Due Process Clause.

82. Defendants, acting under color of state law, are depriving plaintiffs of rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

COUNT II:

**Discrimination on the Basis of Sexual Orientation in
Violation of the Equal Protection Clause of the
Fourteenth Amendment to the United States Constitution
(42 U.S.C. § 1983)**

83. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

84. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

85. By denying the plaintiff couples and other lesbian and gay couples the ability to marry and to have their out-of-state marriages recognized, Nebraska disadvantages lesbian and gay people on the basis of their sexual orientation.

86. Same-sex couples and opposite-sex couples are similarly situated for purposes of marriage.

87. Classifications based on sexual orientation demand heightened scrutiny.

88. Lesbians and gay men are members of a discrete and insular minority that has suffered a history of discrimination in Nebraska and across the United States.

89. Sexual orientation bears no relation to an individual's ability to perform or contribute to society.

90. Sexual orientation is a core, defining trait that is so fundamental to one's identity that a person may not legitimately be required to abandon it (even if that were possible) as a condition of equal treatment. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention. Efforts to change a person's sexual orientation through interventions by medical professionals have not been shown to be effective. No mainstream mental health professional organization approves interventions that attempt to change sexual orientation, and many – including the American Psychological Association and the American Psychiatric Association – have adopted policy statements cautioning professionals and the public about these treatments.

91. Prejudice against lesbians and gay men continues to seriously curtail the operation of the political process preventing this group from obtaining redress through legislative means. Lesbians and gay men lack statutory protection against discrimination in employment, public accommodations, and housing at the federal level and in more than half of the states, including Nebraska. Lesbians and gay men have far fewer civil rights protections at the state and federal level than women and racial minorities had when sex

and race classifications were declared to be suspect or quasi suspect. They have been targeted through the voter initiative process more than any other group.

92. Although classification based on sexual orientation should be reviewed under heightened scrutiny, Nebraska's exclusion of same-sex couples from marriage cannot survive under any level of constitutional scrutiny. It is not rationally related to any legitimate governmental interest. All it does it disparage and injure lesbian and gay couples and their children by denying them the protections and respect of marriage.

93. Nebraska's prohibition of marriage for same-sex couples and its refusal to recognize the marriages of same-sex couples entered into elsewhere violates the Equal Protection Clause.

94. Defendants, acting under color of state law, are depriving plaintiffs of rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

COUNT III:

Discrimination on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (42 U.S.C. § 1983)

95. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

96. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

97. Nebraska's marriage amendment provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."

98. By defining marriage in this way, Nebraska discriminates on the basis of sex. For example, plaintiff Greg Tubach is not permitted to marry plaintiff Bil Roby solely because they are both men. If Greg (or Bil) were a woman, the marriage would be allowed. The only reason the marriage is prohibited is the sex of the partners.

99. Given that there are no longer legal distinctions between the duties of husbands and wives, there is no basis for the sex-based eligibility requirements for marriage.

100. The defendants can demonstrate no exceedingly persuasive justification for this discrimination based on sex.

101. Nebraska law prohibiting marriage and recognition of marriage for same-sex couples thus violates the Equal Protection Clause.

102. Defendants, acting under color of state law, are depriving plaintiffs of rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court enter judgment:

103. Declaring that Neb. Const. art. I, § 29, and any other sources of state law that i) exclude same-sex couples from marrying, or ii) refuse recognition of the marriages of same-sex couples that were validly entered into in other jurisdictions, violate the Due

Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

104. Permanently enjoining all defendants and their agents from enforcing Neb. Const. art. I, § 29 and any other sources of state law that i) exclude same-sex couples from marrying, or ii) refuse recognition of the marriages of same-sex couples that were validly entered into in other jurisdictions;

105. Permanently enjoining all defendants and their agents from denying same-sex spouses any incidents of marriage available to opposite-sex spouses;

106. Directing defendant CEO of the Department of Health and Human Services to i) amend the marriage worksheet that the Department provides to county clerks, which currently provides a space for “groom” and a space for “bride,” to allow couples to apply for a marriage license regardless of gender; and ii) accept records of marriages regardless of the genders of the spouses;

107. Permanently enjoining defendant Lancaster County Clerk from denying marriage licenses to same-sex couples who otherwise meet the requirements to marry under Nebraska law;

108. Awarding the plaintiffs their costs, expenses and reasonable attorneys’ fees pursuant to 42 USC §1988; and

109. Granting such other and further relief as deemed appropriate by the Court.

110. The declaratory and injunctive relief requested in this action is sought against each defendant; against each defendant’s officers, employees, and agents; and against all persons acting in active concert or participation with any defendant, or under any defendant’s supervision, direction, or control.

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